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In the Supreme Court of the United States

OCTOBER TERM, 1998

IN RE ROBERT B. BIECK, JR.,
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In inherent powers proceedings to determine whether attorneys should be sanctioned,

1) Is due process violated by plaintiffs' counsel acting also as counsel to and prosecutor for the court, and testifying as an adverse witness, particularly where plaintiffs' counsel has pending private claims for damages based upon the alleged sanctionable conduct?

2) Is due process violated by the district judge engaging in "extensive and secret *ex parte* communications" with this same plaintiffs' counsel?

3) Whether the federal judicial disqualification statute mandated recusal and prohibits remand of any further sanctions proceedings to the same district judge in the light of the "overwhelming appearance of impropriety" observed by Judge Emilio M. Garza, dissenting in part below?

PARTIES TO THE PROCEEDING

The petitioner in this case is attorney Robert B. Bieck, Jr. The other parties to the proceeding in the court of appeals were:

Larry D. Crowe (deceased)
Estate of Larry D. Crowe
Sue Ellen Crowe Silman
Succession of Reba Coody Crowe
Michael P. Tone
Anne Fiedler
James W. Berry
W. Glenn Burns
William E. Wright, Jr.
Judy L. Burnthorn
American Casualty Company of Reading, Pennsylvania (CNA)
Judge Nauman S. Scott

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PETITION FOR A WRIT OF CERTIORARI

Robert B. Bieck, Jr. ("Bieck") respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit which approved improper procedures for inherent powers attorney sanction cases.

CITATION TO OPINION BELOW

The Court of Appeals decision is reported as *Crowe v. Smith,* 151 F.3d 217 (5th Cir. 1998).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on August 12, 1998. App. 3a. Rehearing was denied on December 17, 1998. App. 67a. By order dated February 1, 1999, issuance of the mandate of the Court of Appeals was stayed pending the filing of this Petition for a Writ of Certiorari. App. 69a. Supreme Court jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The United States Constitution provides in the Fifth Amendment.

> No person shall be ... deprived of life, liberty, or property, without due process of law; ....

28 U.S.C. § 455(a) and (b)(1) provide:

> (a) Any ... judge ... of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

STATEMENT OF THE CASE

This case involves a district judge's adoption of unprecedented procedures to implement his decision to resort to inherent powers in order to sanction attorneys. These procedures subverted due process and fundamental fairness. Approval of these procedures by the circuit court (by split decision) yields a dangerous precedent.

Bieck, an attorney,[1] represented a lawyer defendant in a civil RICO lawsuit filed in December, 1992 against the former directors of and lawyers for a failed savings and loan ("the S&L"). Joseph R. Ward, Jr. ("Ward") was lead counsel for plaintiffs, Larry Crowe, et al. The suit was pending before

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[1] Robert B. Bieck, Jr. is an attorney, licensed in Louisiana since 1977. He is a member of the Bar of this Court, several Circuit Courts of Appeals, several district courts, and the bars of Texas and the District of Columbia. Should his suspension from the U. S. District Court for the Western District of Louisiana take effect, it will trigger automatic sanction proceedings in other courts including suspension and possible disbarment from this Court. Supreme Court Rule 8.1.

Honorable Nauman S. Scott, U.S. District Court for the Western District of Louisiana. The district court jurisdiction was asserted under 28 U.S.C. § 1331.

During the 1995 trial, a $2.25 million partial settlement was entered releasing all defendants except Sonny Smith (former partner of Crowe) and Russell Hart (former officer and director of the S&L). The partial settlement was funded by the professional liability insurers of the lawyer defendants and by American Casualty Co. of Reading, Pa. ("American Casualty") which insured the directors and officers of the S&L under an expired 1986 policy. The settlement agreement released the former directors and attorneys and all of their insurers "including without limitation, American Casualty Company of Reading, Pa., and its parent Continental Casualty Company...."

The jury returned a $8.5 million verdict against Smith and Hart which was trebled to $25.5 million. On February 26, 1996, the Fifth Circuit reversed the verdict against Smith on *res judicata* grounds.[2] However, Hart had settled prior to this reversal.

During a judgment debtor examination of Hart on November 11, 1994 (prior to settling with Hart), Ward obtained a specimen of the expired American Casualty policy. Ward devised a plan to reopen the RICO case and assert amended claims. At the later sanctions trial, Ward's co-counsel, Lynn Frank, admitted that Ward's plan was to use any finding by Judge Scott of sanctionable conduct as the springboard for a filed but unserved state court damages suit.

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[2] *Crowe v. Smith*, 81 F.3d 155 (5th Cir. 1996) (unpublished).

On November 15, 1994, Ward sent a letter to defense counsel, with a copy to Judge Scott, alleging that the expired policy had been withheld in discovery and announcing his intention to set aside the settlement with the released officers and directors and to seek sanctions against their attorneys and others. As to counsel (including Bieck) who did not represent former directors or officers, Ward stated, "Although I find that these individuals may have been aware of the existence of the D&O policy, I cannot say they were legally obligated to disclose it to me. Accordingly, it is not my intention to upset any settlement with their clients."

After receipt of Ward's letter, Judge Scott and Ward discussed *ex parte* Ward's allegations, how to handle them, and their legal effect. They also privately decided the procedures they would invoke to implement Ward's demand for sanctions. Seven *ex parte* telephone conferences totaling 2.6 hours occurred between November 16, 1994 and January 6, 1995 when a status conference was held.[3] Judge Scott did not inform any of the sanctions defendants of these ongoing *ex parte* discussions.

Ward's role had been that of counsel for Crowe. However, on January 7, 1995, Judge Scott also named Ward as counsel "for the United States." App. 71a. After rejecting an offer to prosecute by the U. S. Attorney, Judge Scott recalled his order and, on February 2, 1995, issued an order adopting Crowe's sanctions plea as that of the Court. App. 73a. On June 26, 1995, Ward was appointed "to represent the Court in the investigation and trial of the sanctions

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[3] Other *ex parte* communications occurred later, as set forth below.

allegations." App. 75a.[4] Ward accepted and acted upon this responsibility, all the while continuing to represent Crowe's financial interests and his own 40% contingent fee interest.

Bieck was never added as a respondent to Crowe's private motion for sanctions. However, Judge Scott *sua sponte* added Bieck and others as sanctions defendants in a show cause order issued August 16, 1995 in the underlying RICO case. App. 77a. The order was vague and lumped Bieck into a group of defendants. Bieck was given no notice of the specific charge(s) which Ward had reported to and discussed *ex parte* with Judge Scott, and Bieck did not hear the specifics until after the trial commenced. The order did not specify the proposed sanctions.

Judge Scott continued to have *ex parte* communications with Ward. Ward's time sheets showed a total of 6.7 hours of such communications and that approximately 4 hours of the time was spent after the status conference, including a 1.5 hour "personal conference" on September 6, 1995, after the issuance of the show cause order.

Motions to recuse the court and to disqualify Ward were filed but denied by Judge Scott who argued in a February 8, 1996 order:

> The court, as the initiator of the instant sanctions, is obligated to engage in *ex parte* communications

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[4] In the meantime, on April 7, 1995, Ward had filed an amended complaint for Crowe in the underlying RICO case seeking damages for alleged settlement fraud. In addition, on July 27, 1995, Ward filed but did not serve a state court damage suit alleging settlement fraud. Bieck was not named in either action as filed, but has since been named as a defendant in the state action.

> with and supervision of its investigator, who in this case is Mr. Ward, the attorney for plaintiffs. Consequently, all of the information to which the court has become privy was obtained in the exercise of the court's proper duties and was therefore derived from intrajudicial sources.

No sanctions defendant was ever allowed to know much less respond to "all of the information" to which Judge Scott became "privy" in his *ex parte* discussions with Ward. Judge Scott denied without explanation a "Motion to be Included in Communications Between the Court and Plaintiff's Counsel."[5]

The sanctions trial went forward against eight sanction defendants, seven lawyers, and one insurance company.[6] No one knew what types of sanctions the court might consider imposing. However, the court made it clear that some sanction defendants likely were in trouble when the court announced in a mid-trial order:

> This is a hearing to find out how and who concealed the fact of the D&O policy - it is a hearing about how Mr. Ward got tricked. Mr. Ward could not have first hand knowledge of the critical facts on this issue—if he did, then he never would have gotten

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[5] After he was named in the August 16, 1994 order, Bieck separately filed a motion to recuse Judge Scott and to disqualify Ward. The motions were orally denied on the first day of the sanctions trial, December 4, 1995, and later in writing on February 8, 1996.

[6] The company was American Casualty. The lawyers were Tone and Fiedler, counsel for American Casualty, Wright and Burnthorn, counsel for a former S&L director and attorney, Bieck and Burns, counsel for former S&L attorneys, and Berry, counsel for former directors.

duped in the first place.[7]

Over objection, Ward wore three hats during the trial. He was, simultaneously, (1) counsel for Crowe prosecuting a financial interest, (2) counsel for the court prosecuting the court's interest, and (3) chief witness for the prosecution. He presented witnesses, including himself, and he cross-examined the sanction defendants often cross-examining by contesting his own recollection of events against the witnesses' recollection. Ward's manifold roles violated Louisiana Rules of Professional Conduct 3.4 and 3.7 which prohibit lawyers from asserting personal knowledge of facts in issue and from acting as advocates in trials in which they are necessary witnesses. App. 83a.[8]

The court issued a ruling on July 25, 1996 premised upon fraudulent breach of duty to disclose insurance information during settlement negotiations. The court fined American Casualty $5 million, fined Tone $75,000 (both fines payable to the Clerk of Court), suspended Berry for nine months, suspended Wright, Burns, and Bieck for three months, and reprimanded both Fiedler and Burnthorn.

A split panel[9] of the Fifth Circuit reversed and

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[7] The order containing this statement is the same February 8, 1996 order (*see* fn. 5 *supra*) which issued during a break in the trial. The trial did not conclude until February 13, 1996.

[8] When Ward called Bieck to the stand to question him, counsel for Bieck objected on these grounds. The objection was overruled.

[9] The panel consisted of Judges E. Grady Jolly and Emilio M. Garza, in regular service, and Judge John R. Gibson of the Eighth Circuit, sitting by designation.

dismissed American Casualty and Tone, finding that their monetary sanctions were "criminal" and that they were not afforded the due process right of a fair and impartial prosecutor, i.e., Ward. App. 23a. Although "a very close question," "due process was not found lacking as to the other defendants because their sanctions "are not so criminal in character." App. 23a. Nevertheless, the other sanctions were reversed (except as to Berry) on the ground that the trial judge applied an improper standard to find bad faith, that is, he found a breach of a non-existent duty. App. 48a. The court ordered a dismissal as to Fiedler and Burnthorn finding no evidentiary basis for a proper finding of bad faith. App. 48a. The court remanded the case as to Wright, Burns, and Bieck for the trial court to reconsider the evidence as to its bad faith finding. App. 51a. The court affirmed as to Berry.

The remanded parties and Berry moved for rehearing and suggested rehearing *en banc*.[10] Judge Scott filed his own Suggestion for Rehearing *En Banc* (through Ward) in which he made it patently clear that he believes the Fifth Circuit's opinion undermines his authority, undermines respect for the judicial process, and will subject his court to becoming "the helpless puppet of unethical parties...." Judge Scott clearly stated his feeling about the remand issue of bad faith. The premature but preemptive conclusion of guilt, which he reached and announced during the trial, was repeated with emphasis in his Suggestion, indicating that the conclusions to be reached upon remand are foreordained. In Judge Scott's words, "The Court concluded that the settlement was a

[10] Bieck also petitioned for panel rehearing, pointing out that the record was sufficient to exonerate him from any suggestion of bad faith. All petitions for rehearing were denied.

'cheat' and that it could not have been accomplished without the 'active and deliberate fraud and deceit practiced' by *all* defense counsel." (Suggestion p. 5)(Underscore added).

REASONS FOR GRANTING THE WRIT (SUMMARY DISPOSITION SUGGESTED)

The Fifth Circuit has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power. Supreme Court Rule 10(a). Concurring in part and dissenting in part below, Judge Emilio M. Garza accurately described the district court proceeding in this case:

> After a thorough search of the relevant case law, I have found no case in which a district court used procedures like the ones here to impose inherent powers sanctions, let alone where such procedures were upheld on appeal. Particularly where the district court appoints the interested opposing attorney to prosecute the contempt, engages in secret *ex parte* communications with the attorney, and allows the attorney to testify as a fact witness, this court errs in condoning the district court's use of inherent powers. In the light of these unpecedented and unparalleled procedures, I conclude that the district court failed to provide due process in imposing the disbarment, suspension, and reprimand sanctions.

App. 65a. Judge Garza also concluded that the majority's result is in "direct contradiction" of Supreme Court and Fifth Circuit precedent. This, too, merits allowance of a writ.

Both the magnitude of the error in this proceeding from

its start, and the unfairness visited upon the sanction defendants, are so great that this Court should act. It should not require more attention by this Court than summary disposition pursuant to Supreme Court Rule 16.1. A most basic reason to exercise supervisory jurisdiction should be to insure fundamental due process and fairness to parties before the federal courts.

A. The Unprecedented Procedure Approved By A Divided Panel Of The Fifth Circuit Threatens The Integrity Of The Federal Judicial System.

In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), this Court, with Chief Justice Rehnquist and Justices Kennedy, Souter, and Scalia dissenting, laid down a definitive opinion regarding the inherent power of a federal district court to impose sanctions upon parties and attorneys. It was noted that the disbarment of an attorney was a penalty "among the harshest possible sanctions and one which derived from its authority to supervise those admitted to practice before [the court]." *Id.* at 40, fn. 5. Disbarment is at least "quasi-criminal." It is a "punishment or penalty imposed on the lawyer." *In re Ruffalo,* 390 U.S. 544, 550 (1968).

NASCO defines due process in an inherent powers sanction case. Because of the sheer potency of the power approved in *NASCO*, this Court emphasized that "inherent powers must be exercised with restraint and discretion," 501 U.S. at 44, and the court "must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." *Id.* at 50; *see also In re Ruffalo,* 390 U.S. at 550.

Citing *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946), this Court in *NASCO* also confirmed the power of a lower court to conduct an independent investigation in order to determine whether it had been the victim of fraud. 501 U.S. at 44. In setting forth this principle, *Universal Oil* established that a court may "bring before it by appropriate means all those who may be affected by the outcome of its investigation." 328 U.S. at 580. "But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed." *Id. Universal* approved the appointment by a court of *amici* counsel to represent the public interest in the administration of justice, but the warning went forth that "*[a]mici* selected by the court to vindicate its honor ordinarily ought not be in the service of those having private interests in the outcome." *Id.* at 581. As the Fifth Circuit recognized in its own opinion in *NASCO, Inc. v Calcasieu Television and Radio, Inc.*, 894 F.2d 696, 707 (5th Cir. 1990), one reason for the limitation in *Universal* is "the danger ... that private counsel would be overzealous in the contempt proceedings in an effort to further the interest of his client ...." In *Universal*, this Court emphasized, "After all, a federal court can always call on the law officers of the United States to serve as *amici*." 328 U.S. at 581.

Justice Kennedy wrote in *NASCO*, dissenting, that he was gravely concerned about the misuse of inherent powers. Justice Kennedy's concerns about the danger of district courts relying on inherent authority as a substitute for existing rules and statutes and his comments about such "unchecked power" are relevant to the case presented to this Court by the instant petition. In the words of Justice Kennedy,

> Upon a finding of bad faith, courts may now ignore any and all textual limitations on sanctioning power. By inviting district courts to rely on inherent authority as a substitute for attention to the careful distinctions contained in the rules and statutes, today's decision will render these sources of authority superfluous in many instances. A number of pernicious practical effects will follow.

501 U.S. at 67.

In *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 833 (1994), a contempt case, this Court noted that "...further procedural protections are afforded for contempts occurring out of court...." This Court through Justice Blackmun expressed its concern that, in cases where the judge has no personal knowledge of the material facts which are in close dispute, and elaborate fact finding is necessary, which is the case *sub judice*,

> ... the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial. Under these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power.

Id. at 834 (citation omitted). This basic tenet was echoed by Justice Scalia, concurring, in language which perfectly addresses inherent powers sanctions. Justice Scalia saw no reason to make the fine distinctions which often differentiate between civil and criminal contempts. He wrote:

> That one and the same person should be able to make the rule, to adjudicate its violation, and assess its penalty is out of accord with our usual notions of fairness and separation of powers. And it is worse still for that person to conduct the adjudication without affording the protections usually given in criminal trials. Only the clearest of historical practice could establish that such a departure from the procedures that the Constitution normally requires is not a denial of due process of law.

Id. at 840 (citations omitted).

In this case, Judge Garza concluded, "...under *Bagwell*, these sanction proceedings were the precise type of situation where the 'risk of erroneous deprivation from the lack of a neutral factfinder' was substantial." App. 58a.

The instant writ application seeks review by this Court of a district judge's extension and implementation of inherent powers beyond the limitations imposed by *Universal*, beyond the scope authorized by the majority in *NASCO*, and absent the due process procedures constitutionally expected under *In re Ruffalo*, *NASCO*, and *Bagwell*. This is the same district judge who decided *NASCO* in the first instance. His expansion of inherent powers in this case, beyond the realm of legal limits, has yielded the pernicious effects forewarned by Justice Kennedy in *NASCO* and is, therefore, a dangerous precedent which threatens the integrity of the federal judicial system.

The action of the district court, affirmed in principle by a divided circuit court panel, also threatens the ability of lawyers to continue to practice in the federal court system

uninterrupted by temporary disbarment or suspension imposed without the usual safeguards attendant to federal court proceedings. This is no mere practical inconvenience. It is the most severe and draconian consequence that can be imposed upon a federal court practitioner regardless of whether the disbarment is temporary or permanent. It is a professional death sentence. Therefore, the attorney before the bar of a federal court considering disbarment must be accorded due process. His or her fate must be the subject of a fair prosecution by an impartial prosecutor, and there must be a decision by an impartial trier. This is the simple principle which petitioner asks this Court to impose in this case, consistent with *NASCO* and *In re Ruffalo,* no more, no less.

The integrity of the judicial system and the functioning impartiality of district judges is brought into question in this case. Even the majority of the lower court panel considered the question before it "close and vexatious." App. 29a. But, the court nevertheless approved the procedures followed by the district court with respect to sanctioning attorneys. Although the court reversed as to Bieck and remanded the case to the same district judge on a narrow fact question, this reversal and remand gives little consolation to Bieck because the same district judge should not sit on this case, and he has already announced what he will decide upon remand. As important to the federal judiciary, the approval of the unusual procedure in this case, never before allowed, threatens the very fabric of the courts by undermining due process and basic fairness.

B. The Proceedings Were Vitiated By The District Court's Allowing Plaintiff's Counsel To Serve Simultaneously As Private Attorney, Prosecutor, And Chief Witness.

That Ward was not an impartial prosecutor is firmly established. He acted simultaneously as counsel for the court and counsel for Crowe in prosecuting both the Court's sanction motion and Crowe's financial interests. The panel majority below expressly found that Ward was not a disinterested prosecutor and that his appointment as counsel for the court violated the command of *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). "In this case, Ward's concurrent representation of the Crowes, who retained substantial possibilities for private recovery against the defendants, coupled with his own potential malpractice liability for the events at issue, combine to belie any contention that he was 'as disinterested as a public prosecutor.'" App. 20a. Accordingly, the majority reversed on due process grounds the "criminal" sanctions of the defendants who received monetary fines. However, reasoning that "'quasi-criminal' means 'less than criminal' for due process purposes," the majority analyzed the "close and vexatious question" of "just which 'basic procedural safeguards' will be generally implicated by imposition of the 'quasi-criminal' sanction of disbarment" and concluded, without justification or explanation, that the procedure of appointing interested plaintiffs' counsel was "adequate" as to the suspended attorneys. App. 5a.

In his opinion, Judge Garza correctly rejects the majority opinion and concludes, "[T]he Supreme Court's decisions in [*Bagwell* and *Young*], as well as our own warning in *NASCO*... mandates a reversal of the quasi-criminal sanctions imposed under such defective procedures." App. 53a.

This Court ruled long ago that a federal court has the inherent power to investigate "whether a judgment was obtained by fraud" and "may bring before it by appropriate means all those who may be affected by the outcome of the investigation." *Universal Oil Products Co. v. Root Refining Co.*,328 U.S. 575, 580 (1946). "But if the rights of the parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed." *Id. Universal* also warned, "*Amici* selected by the court to vindicate its honor ordinarily ought not be in the service of those having private interests in the outcome." *Id.* at 581. Likewise, the Court in *Young* held, "A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." 481 U.S. at 804. Thus, a district court using its inherent powers may not appoint a private attorney who represents an interested party because the "opportunity" for conflicts arises and creates "at least the appearance of impropriety." *Id.* at 806. "The potential for misconduct that is created by the appointment of an interested prosecutor is not outweighed by the fact that the counsel for the beneficiary of the court order may often be most familiar with the allegedly contumacious conduct," *Id.*, fn. 17, and "the fact that the judge makes the initial decision that a contempt prosecution should proceed is not sufficient to quell concern that prosecution by an interested party may be influenced by improper motives." *Id.* at 807.

Ward's partiality was the basis relied upon by the panel majority to reverse the fines against American Casualty and Tone. The court found that they were entitled to "an independent and impartial prosecutor" and other protections under *Young*. App. 23a.

That none of these protections were available to the sanction defendants facing disbarment makes absolutely no legal sense. This was the view of Judge Garza who wrote, "[A]t rock bottom, 'ample opportunity' to present a defense to a charge of disbarment must include an *impartial* decision maker and, if one is needed, a *disinterested* prosecutor." App. 56a. In the light of this Court's precedents, Judge Garza's view of "rock botton" procedural protection is absolutely correct. In our judicial system, rock bottom fundamental due process and fairness is the cornerstone of integrity.

The panel majority was driven by a belief that a distinction should be drawn between the fined parties and the suspended or disbarred parties based upon the "types of 'relief'" ordered by the district judge. This is a distinction without a difference or a justification. A disbarred attorney is every bit as financially penalized as a fined attorney, even more so in view of the automatic triggering of sanctions in other courts where admitted, not to mention permanent career damage. Disbarment is a punishment. *In re Ruffalo,* 390 U.S. at 550. It is also disingenuous to rest upon such a distinction in this case where, under the district court's show cause order, no party was placed upon notice that he, she, or it was facing any particular form of sanction. To the contrary, all sanction defendants were exposed to a trial and sanctions in an unknown range according to the penalties that the judge himself decided to assess after the record was closed. Nothing in the record or history of this case indicates that the district judge or the parties ever intended or understood that different forms of procedure would apply to different sanction defendants—nor could they, because the judge was making the rules as the case progressed.

The integrity of the proceeding was also thoroughly

destroyed when Ward was allowed to take the stand as the prosecutor's —i.e., his and the court's—chief witness, then, once off the stand, to call and cross-examine the sanction defendants about the very first person experiences he had just related as a witness. Ward's combination of roles is unheard of in a court.

At a minimum, Ward should have been disqualified once he became a witness. The Rules of Professional Conduct ("RPC") promulgated by the Louisiana Supreme Court (1987) are specifically applicable to all lawyers practicing before the Western District. Uniform District Court Rule 20.04W (App. 82a). RPC Rule 3.7 (App. 83a) prohibited Ward from acting as counsel in the case because he testified as a necessary witness.

The panel majority was anything but confident of its legal footing as the following shows. "In resolving this case, we must simply remain content to retain the vague, 'quasi-criminal' designation that our precedents have expressly chosen to place upon such [suspension] sanctions, and conduct our due process analysis on that basis" (App. 27a) (referring elsewhere to attorney discipline as "squarely placed in a decidedly different and grayer area by both the Supreme Court and our own past decisions" (App. 24a), and to the "murky 'quasi-ness of disbarments' criminal character" (App. 33a)).

In the final analysis, the panel majority's due process analysis resulted in no due process protections being afforded the disbarred attorneys. Relying upon the Fifth Circuit's own *NASCO* opinion[11] as "largely dispositive" (App. 29a), it was held:

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[11] *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696 (5th Cir. 1990).

> We read NASCO [5th Circuit] as standing for the proposition that Young is not infringed, even where the district court relies on interested opposing counsel to present the facts giving rise to the imposition of the quasi-criminal sanction of disbarment, so long as the court relies on its own research ... with regard to relevant legal issues and the overall appropriateness of disbarment.

App. 31a - 32a. The panel majority concluded that avoiding placing the interested counsel in the "role of prosecutor" will "escape the mandate of *Young*." App. 32a.

But Ward was an unusually effective prosecutor because of his multifaceted official roles, his *ex parte* secret communications with the district judge, and his "evidence" which went well beyond the limited evidentiary submission in *NASCO*. Judge Garza correctly refuted the panel majority's misplaced interpretation of *NASCO* pointing out (1) that *NASCO* did not involve *ex parte* communications between the district judge and the court-appointed private prosecutor, (2) that the attorney appointed in *NASCO* was not also a fact witness, and (3) that the evidence presented by the private attorney in *NASCO* was limited to the issue of appropriate monetary sanctions as compensation for attorney fees, which avoided "the danger present in *Young*, that private counsel would be overzealous in the contempt proceedings in an effort to further the interest of his client." App. 61a. Judge Garza observes, "Indeed, if there is any case to which the rule in *Young* applies, it is this one." App. 61a. Judge Garza emphasized "that none of the cases cited by the majority involve a testifying attorney who is also prosecutor for the court." App. 65a. In *Young*, the Court specifically warned, "[T]he attorney for an interested party who prosecutes a

contempt action must reckon with the proscriptions on conflicts of interest applicable to all lawyers." 481 U.S. at 804, fn. 15.

There was only one correct outcome in the circumstances of this case. Those sanction defendants who were tried under the show cause order, which exposed each of them to the same inherent powers of the district court to make the rules, adjudicate the violation, and decide upon the penalty, were all entitled to the same basic due process protections and fairness. To conclude otherwise is to approve of a trial without any basic protections in a court without rules.[12] It is patently unreasonable to devise separate rules based upon the differences in penalties ultimately meted out when no one, perhaps not even the district judge, had a vision at the outset of what those penalties would be.[13] Mere afterthought designation of a case as "criminal," "quasi-criminal," or "civil" can not serve as a judicial standard for the institution and trial of attorney sanction proceedings. It is patently unfair and inconsistent with the integrity of the judicial system to allow to stand a rule that allows for no due process protections in attorney suspension/disbarment proceedings so long as in the final outcome there are no monetary fines. Therefore, this Court should act to correct the wrong inflicted by the district court and approved by the Fifth Circuit, and to remove the dangerous precedent created below.

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[12] Black's Law Dictionary 6th Ed. (West 1990) defines "kangaroo court" as a "[t]erm descriptive of a sham legal proceeding in which a person's rights are totally disregarded and in which the result is a foregone conclusion because of the bias of the court or other tribunal."

[13] However, in his own request to the circuit court for *en banc* rehearing, the district judge categorized the punishment of most of the sanction defendants as "low sentences." (Suggestion p. 7).

C. Recusal Of The District Judge Was And Is Mandated.

Bieck's conduct was above reproach. The intensity of this petition is fueled by the belief that, despite Ward's November 14, 1994 letter which did not implicate Bieck in any alleged wrongful conduct, an impenetrable curtain of fraud was drawn by Ward in Judge Scott's mind during the extensive pretrial *ex parte* communications. By the time the show cause order issued on August 16, 1995, the aura of fraud captivated the judge's thinking and had subsumed Bieck and others in the alleged scheme, which effects were only reinforced by further *ex parte* communications after August 16. No amount of exculpatory evidence was going to be, nor was it, sufficient to exonerate Bieck. He and others were lumped together, adjudged guilty from the outset, and saddled with an impossible burden of disproof, as evidenced by the judge's mid-trial remarks and by his own *en banc* rehearing request in the circuit court.

If this matter is to be remanded for any reason, this Court should require the recusal of Judge Scott. For more than a year prior to the sanctions hearing, Judge Scott engaged in 6.7 hours of "extensive and secret *ex parte* communications" (App. 64a) with plaintiffs' counsel who was also the chief adverse witness at the hearing. The panel majority agreed that *ex parte* communications would be a "serious deviation" from the procedure approved in *NASCO* (App. 33a), but then proceeded to mislabel these communications as "isolated *ex parte* contacts...limited to the most *de minimis* and harmless procedural matters." Judge Garza rejected the majority's characterization because "the record belies this contention." App. 62a. Indeed, the *ex parte* communications include a 1.5 hour "[p]ersonal conference with Judge Scott" which occurred weeks after Judge Scott's order of August 16,

1995 declaring discovery complete and setting the trial.

As Judge Garza recognizes, the record clearly refutes the attempt to minimize the *ex parte* communications as being limited to basic procedural questions. Furthermore, the panel majority specifically found: "Based on its [*ex parte*] communications with Ward, however, the court had already become convinced at the time of the informal meeting [on January 6, 1995] that the directors would likely enter into a renewed settlement with the Crowes, and that sanctions might well be waived therein." App. 14a. The fact that Judge Scott had "become convinced" of illicit motives as alleged by Ward nearly a year prior to the sanctions trial disproves, from the panel majority's own perspective, the assertion that the *ex parte* communications were limited to minor procedural questions. Furthermore, Bieck was named as a sanctions defendant only by Judge Scott and not until his August 16, 1995 show cause order. The sole basis given for adding Bieck was "all of the information to which the court [had] become privy" during Judge Scott's admitted "*ex parte* communications with and supervision of its investigator, who in this case is Mr. Ward, the attorney for plaintiffs." The *ex parte* communications clearly violated the rules of *Young* because all that is required to corrupt due process is the "*potential* for misconduct that is created by the appointment of an interested prosecutor." 481 U.S. at 805 (emphasis original). *Young* found that any *ex parte* communications with interested counsel create "at least the appearance of impropriety." *Id.* at 806. But in this case, Judge Garza correctly noted that the record demonstrates an "overwhelming appearance of impropriety." App. 63a.

Judge Garza emphasizes that the *ex parte* communica-

tions with Ward not only compounded the error of appointing interested private counsel to represent the court but also contradicted Model Code of Judicial Conduct Canon 3(B)(7)(1990)("A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceding...."). App. 62a; *see also* Canon 3A(4) of the Code of Conduct for United States Judges (1993 Ed.). Likewise, Rule 3.5 of Louisiana's Rules of Professional Conduct prohibited Ward from communicating *ex parte* with Judge Scott. App. 83a.

During the course of these *ex parte* communications, Judge Scott denied a "Motion [by Wright, et al] To Be Included In Communications Between The Court And Plaintiff's Counsel." The court also instructed Ward not to disclose the contents of those communications as demonstrated by a secret instruction, not lifted until after the trial commenced, that Ward *not* supplement answers to interrogatories.

The panel majority completely overlooked the fact that the absence of an impartial prosecutor, which violated due process rights of the fined defendants, coupled with Ward's other roles, necessarily triggered statutory recusal of the district judge under 28 U.S.C. § 455(a) and (b)(1). This Court observed in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988), that the purpose of § 455 is to "promote public confidence in the integrity of the judicial process...." In other cases, the Fifth Circuit has taken this to heart.

Fifth Circuit precedent holds that § 455 mandatory disqualification is a more demanding requirement than that established by the Due Process Clause. The latter requires

a judge to step aside when a reasonable judge would question the appearance of impartiality. The former requires recusal when others, unfamiliar with the judicial system, would have reasonable cause to question the Judge's impartiality. *U.S. v. Couch,* 896 F.2d 78, 80-82 (5th Cir. 1990); *U.S. v. Jordan,* 49 F.3d 152, 155-157 (5th Cir. 1995); *In re Faulkner,* 856 F.2d 716, 720-21 (5th Cir. 1988). In addition, §455(b)(1) mandates recusal whenever the judge obtains "personal knowledge of disputed evidentiary facts." *In re Faulkner,* 856 F.2d at 721. A showing of actual bias is unnecessary. *Id.*

Judge Scott became convinced before the trial that illicit motives had been at work among defense counsel. He stated, half-way through the hearing, "[t]his is a hearing about how Mr. Ward got tricked." Therefore, disqualification was mandatory, first under Section 455(a) as well as under the more demanding Due Process Clause, and second, under Section 455(b)(1) because Judge Scott clearly obtained "personal knowledge of disputed evidentiary facts concerning the proceeding" during his *ex parte* discussions with Ward.

In addition, as Judge Garza wrote: "In the light of the three hats worn by plaintiffs' attorney Ward ..., the district court's secret ex parte communications with the private prosecutor create an overwhelming appearance of impropriety." App. 63a. This appearance alone singularly mandated recusal.

The record establishes, beyond serious argument, that even before the sanctions trial took place, the district judge had a solidly formed bias against Bieck, founded in whole

or in part upon the *ex parte* information which he received from Ward. It would not be fair to Bieck to relegate him to the same judge. If a further factual determination must be made, let it be at the hands of another judge. If this case should be remanded for any purpose, this Court should vindicate public confidence in the integrity of the judicial process. This Court should order the recusal of the district judge.

CONCLUSION

This Court emphasized in *NASCO* that inherent powers to sanction attorneys, because of their potency, must be exercised with "restraint and discretion" and that due process must be afforded to sanction defendants. These concepts seem somehow to have been lost in this case. The district judge has been an aggressive advocate throughout this case. He has unreservedly appointed as counsel for the court a private attorney pursuing the pecuniary interests of his client-plaintiff. He has engaged in extensive *ex parte* communications with this attorney and allowed him to expand his role to that of chief prosecution witness. The district judge declared in a mid-trial order his predispositon to rule against defendants, obviously influenced by his appointed counsel's secret communications.

This case represents the antithesis of restraint and discretion. It represents a gross departure from controlling legal principles founded in due process considerations and from the accepted and usual course of judicial proceedings.

This Court should issue its writ and, summarily on this record, reverse and dismiss as to Bieck. If remand is allowed to stand, the district judge should be recused.

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